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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Limitations on Commercial Time on Television Broadcast Stations	)	MM Docket No. 93-254

To the Commission:

STOP CODE 1800D

REPLY COMMENTS OF SILVER KING COMMUNICATIONS, INC.

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February 4, 1994

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SUMMARY OF ARGUMENT

The comments filed herein reflected virtually unanimous agreement that the Commission should not, and cannot constitutionally, reimpose limitations on the telecast of commercial matter in general and on the home shopping entertainment format in particular. The two comments supporting such action fail to submit countervailing arguments sufficient to support Commission disregard of the overwhelming opposition to commercial reregulation.

In particular, these comments fail to acknowledge, much less address, the impact of changes in the video marketplace. They fail to document any tangible harm associated with telecast of commercial matter. And, most significantly, they fail to address the clear constitutional infirmities in the content-based regulation of speech which they advocate.

The alleged "harms" associated with "excess" advertising contrived by these two comments are largely inapplicable to the home shopping entertainment format. To

the extent they are even remotely relevant, they are not constitutionally cognizable.

Thus, their argument that stations' broadcast of commercial matter should be limited in order to facilitate broadcast of other more "beneficial" types of programming asks for content-based regulations clearly prohibited by both the constitution and statute: the Commission cannot take action intended to discourage a particular programming format or to favor another. (In any event, there is no guarantee that stations' choices of substitute programming would be any more acceptable to CSC and USCC.)

Their related claims concerning commercial matter's purported adverse social impact (which are totally undocumented) afford an equally constitutionally impermissible basis for regulation. The Commission is not authorized to engage in broadbased social engineering through broadcast regulation: such decision-making is clearly prohibited by the First Amendment.

In short, CSC and USCC's obvious and visceral dislike of commercial programming cannot support restrictive government regulation. Commercial speech enjoys substantial First Amendment protection and the hysterical claims contained in these two comments do not warrant any reduction in that protection.

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Silver King Communications, Inc. ["SKC"][1/], by its attorneys, submits herewith its Reply Comments in the above-captioned proceeding.[2/]

Introduction

The Notice herein invited comments concerning possible reimposition of pre-deregulation[3/] restrictions on television stations' commercial practices. Virtually all

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1/ As set forth in its initial Comments herein, SKC is the parent of the licensees of 12 television stations [the "SKC Stations"], all of which carry the home shopping entertainment format of Home Shopping Club, Inc. ["HSC"], a wholly-owned subsidiary of Home Shopping Network, Inc. ["HSN"].

2/ Notice of Inquiry, MM Docket No. 93-254 (October 7, 1993) ["Notice"].

3/ Report and Order, MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ["Television Deregulation"], recons. denied, Memorandum Opinion and Order, 104 FCC 2d 358 (1986), aff'd in part and remanded in part sub. nom., Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

parties which responded to that invitation emphatically opposed any such action.

SKC, for example, demonstrated that Television Deregulation has fulfilled the Commission's most optimistic expectations: deregulation's freedom produced extensive innovation and, more particularly, permitted creation of the home shopping entertainment format. This first practical application of interactive television has proven to be enormously popular with viewers and has facilitated the growth and development of many television stations, including a substantial number of minority-owned and UHF television stations.[4/] The other affirmative public interest benefits associated with the home shopping format -- such as affording shopping opportunities to those who might not otherwise have them -- strengthen the case against singling out the home shopping format for repressive regulatory treatment.

Indeed, SKC established that such discriminatory regulation of the home shopping format would offend the First Amendment. SKC pointed to the lack of any demonstrated or demonstrable harm associated with the broadcast of commercial speech and the consequent lack of

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4/ See, e.g., Comments of Blackstar Communications of Oregon, Inc.; Comments of Brunson Communications, Inc.; Comments of Miller Broadcasting, Inc.; Comments of WIIB-TV, Bloomington, Indiana.

any governmental interest (much less a substantial interest) in its restriction. The Statement of Professor Rodney A. Smolla, a recognized constitutional expert, confirmed that this absence of a governmental interest, particularly when combined with the home shopping format's clear public interest benefits, deprives any potential restrictions on this form of commercial speech of constitutional validity. To the contrary, limitations on televised commercial matter in general and home shopping programming in particular would not withstand First Amendment scrutiny.

With only two exceptions, other comments reflected unanimous agreement that reimposition of television commercial limits would be unconstitutional; would ignore the impact of the radical and continuing changes in the video marketplace; are unnecessary in light of the myriad of alternatives to programming which viewers consider overly commercial; would have an unfair, disparate impact on broadcast television stations, creating a substantial disadvantage vis a vis their cable television competitors; and would stifle innovation. The near-unanimous opposition to an "anachronistic"[5/] return to pre-deregulation

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5/ See Comments of CBS, Inc. at 2; Comments of Tribune Broadcasting Company at 2.

commercial limitations must weigh heavily in the Commission's decision.[6/]

Indeed, only two comments supported further proceedings herein.[7/] Those comments are as enlightening for what they do not say as for what they say. For example, they fail to suggest a constitutional basis for restricting television stations' commercial practices, nor do they indicate how such restrictions could be reconciled with the First Amendment. They fail to acknowledge, much less address, the impact of the changes in the video marketplace which have occurred not only since Television Deregulation, but since commercial restrictions were first discussed and imposed. And they fail to document any specific harm associated with the broadcast of commercial matter in general and the home shopping format in particular. Such critical omissions deprive them of all credibility.

The Commission cannot simply ignore obvious constitutional requirements. It cannot disregard the realities of the contemporary video marketplace. And it cannot act without a factual and legal predicate for its

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6/ Cf., Telocator Network of America v. FCC, 691 F.2d 525, 538 (D.C. Cir. 1982).

7/ Comments of the Center for the Study of Commercialism, Center for Media Education, Consumer Federation of America, and Office of Communication of the United Church of Christ ["CSC Comments"]; and Comments of the United States Catholic Conference ["USCC Comments"].

action. Two comments' isolated calls for governmental paternalism are not a legitimate basis for regulatory decision-making.

The "Harms" CSC and USCC Cite are Nothing More Than Subjective Dislike of Particular Program Content

CSC cites several purported "harms" associated with "excess"[8/] advertising: it displaces broadcast time which would be better used by the presentation of other types of programming;[9/] it deceives viewers; it encourages "...viewers to be especially interested in acquiring material goods for themselves, to the detriment of other aspects of life and the general society;"[10/] it facilitates advertiser involvement in program content; and program length commercials directed at children are harmful. Only two of these objections are even remotely relevant to home

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8/ CSC never attempts to define, or even suggest a definition for, "excess" advertising.

9/ This is USCC's only objection to commercial programming.

10/ CSC Comments at 4.

shopping programming.[11/] Neither affords a basis for the action CSC and USCC request.[12/]

Program Substitution. The assertion that commercial time should be limited so that stations can present other, more "beneficial" types of programming, is nothing more than a request that the Commission discourage one type of program content -- commercial matter -- and favor another. The First Amendment clearly forbids this

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11/ CSC makes no claim (and thus submits absolutely no evidence) that home shopping programming in general, and HSC programming in particular, is deceptive. The SKC Stations' home shopping format precludes advertiser involvement in their programming and thus this purported "harm" is likewise inapplicable. Finally, the children's programming which the SKC Stations broadcast is commercial-free educational and informational programming, making CSC's concerns in this regard (which were, in any event, rejected by the Commission in reconsidering the rules adopted pursuant to the Children's Television Act of 1990, see Memorandum Opinion and Order, MM Docket No. 90-530, 6 FCC Rcd 5093 [1991]) likewise irrelevant to SKC's operations.

12/ The flimsy nature of these purported harms is emphasized when compared with the growing number of studies concerning violent programming, such as the recent survey sponsored by Senator Byron L. Dorgan which demonstrated the high level of violence on television programming. Significantly, even in the face of numerous similar studies and Congressional and other calls for restrictions on violent programming, Congress has thus far been reluctant to regulate such programming because of constitutional and censorship considerations. Here, in the absence of similar studies demonstrating tangible harm associated with home shopping programming (not to mention the existence of countervailing public benefits), such reluctance must become total forbearance.

type of content-based regulatory preference.[13/] As Professor Smolla demonstrated in his Statement in support of SKC's initial Comments and as he confirms in his attached Reply Statement (and as other commenting parties agree[14/]), the constitution prohibits the government from favoring one program format and restricting another.[15/]

Congress, the Commission and the courts have long recognized and deferred to the constitutional and statutory limitations on Commission involvement in licensees' program content decisions. Congress enacted Section 326 of the Communications Act, which specifically prohibits censorship by the agency.[16/] Consistent with that prohibition, the

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13/ As the Supreme Court observed over 20 years ago, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content...The essence of this forbidden censorship is content control." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

14/ See, e.g., Comments of the National Association of Broadcasters at 5, et seq.; Comments of the Virginia Association of Broadcasters and the North Carolina Association of Broadcasters at 5, et seq.; Comments of the New Jersey Broadcasters Association at 7, et seq.; Comments of Capital Cities/ABC, Inc. at 11, et seq.

15/ It is hornbook law that broadcasting is entitled to First Amendment protection. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); United States v. Paramount Pictures, 334 U.S. 131 (1948).

16/ "The historic aversion to censorship led Congress to enact § 326 of the [Communications] Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 116 (1973).

Commission has repeatedly refused to mandate licensees' programming selections or to base regulatory decisions upon determinations as to what constitutes a "good" or "bad" program.[17/] And the courts have confirmed that the Commission cannot become involved in program content decisions.[18/]

These constitutionally- and statutorily-mandated restrictions on Commission interference with licensees' programming decisions mean that the Commission cannot take action designed to discourage presentation of particular programming and to favor another type of programming. In particular, it cannot limit the presentation of home shopping programming in order to encourage television stations to present other types of programming which it (or CSC or USCC) finds to be more "beneficial" to the public.[19/]

17/ See, e.g., Report and Statement of Policy re: Commission en banc Programming Inquiry, 20 RR 1901, 1908 (1960) ["The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision"]; The Evening News Association, 35 FCC 2d 366 (1972); Radio Akron, Inc., 62 FCC 2d 987, 995 (1977); Television Wisconsin, Inc., 58 FCC 2d 1232, 1235-1236 (1975); KSD/KSD-TV, Inc., 61 FCC 2d 504, 511 (1976).

18/ See, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981); Muir v. Alabama Ed. Television Comm., 688 F.2d 1033 (5th Cir. 1982).

19/ Indeed, the record in MM Docket No. 93-8 demonstrates that many find the availability of home shopping programming to be beneficial. Why should the Commission deem CSC and

(continued...)

Presumably, CSC and USCC would also prefer that stations broadcast public affairs and public service programs instead of soap operas, violent dramatic programs such as "NYPD Blue," or sexually-oriented talk shows, yet they do not suggest that the Commission limit such programs. Nor do they suggest a legitimate basis for disparate restrictive treatment of commercial and home shopping programming.

There is no guarantee that, even if the Commission ignored its constitutional obligations and limited the broadcast of commercial matter or home shopping programming, television stations would substitute public affairs or public service programming acceptable to CSC or USCC.[20/] Certainly, the Commission cannot force stations to do so. As a practical matter, they are likely to carry programming with greater public appeal -- entertainment programming with

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19/ (...continued)
USCC's evaluation of the relative "worth" of home shopping programming to be superior to that of viewers of such programming?

20/ CSC suggests that if commercial limits were imposed, stations would devote more time to presentation of information concerning non-commercial activities. CSC Comments at 14. The SKC Stations' submissions in MM Docket No. 93-8 demonstrate that (1) they already carry a substantial number of public service announcements and programming information concerning local public service activities and events; and (2) they outperform most of their UHF competitors in their markets in this regard. Therefore, there is no basis to believe (and in fact there is evidence to the contrary) that a mandated change in entertainment format would lead to more public interest programming.

proven audience-attracting capability, such as movies, game shows and sexually-oriented talk shows. CSC and USCC do not indicate why such programming is so preferable to commercial or home shopping programming that the government must ignore its constitutional and statutory obligations in order to favor it.

In short, the fact that broadcast time devoted to the presentation of commercial matter or home shopping programming could be used to present other types of programming is not the type of societal "harm" necessary to support a governmental interest in the suppression of speech.[21/]

Adverse Social Impact. To contrive additional "harms" associated with home shopping programming, CSC relies on hysterical hyperbole, claiming that commercial programming encourages societal materialism.[22/] Restriction of home shopping programming, it suggests, will cure social problems such as "greater pollution and

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21/ The Commission has previously refused to restrict television advertising of over-the-counter drugs because of the lack of any evidence of harm associated therewith. Petition to Promulgate a Rule Restricting the Advertising of Over-the-Counter Drugs on Television, 62 FCC 2d 465 (1976) ["Drug Advertising"].

22/ CSC fails to afford any evidence to support this speculation. By contrast, SKC cited one study which indicated that home shoppers tend to be less materialistic than non-shoppers. WSL Marketing, Smart Marketing Report, "Television Shopping: The New Retailing" (1993) at 18.

environmental degradation; personal financial difficulties; health problems related to excessive drinking, smoking, and poor diet; and disinterest in government and society at large."[23/] The fashion of blaming television for all of society's problems is not, however, a legitimate basis for Commission programming regulation.

Not only does CSC fail to document its biased social commentary: it fails to cite any FCC authority to act based upon the private moral concepts inherent in that commentary.[24/] The Commission has no mandate to engage in social engineering. Indeed, the constitution demands that it decline CSC's invitation to do so.

Professor Smolla's Reply Statement highlights the constitutional infirmities of CSC's arguments. Professor Smolla makes it clear that the government emphatically cannot "... regulate the First Amendment marketplace in a

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23/ CSC Comments at 15. Among other flaws in CSC's extraordinary claims, it seems unlikely that excessive broadcast commercialism contributes to excessive smoking in light of the fact that broadcast advertisements for tobacco products have long been banned -- cigarette advertising was first prohibited almost 30 years ago. See 15 U.S.C. §§ 1331 et seq.; 15 U.S.C. § 4402.

24/ As the Commission concluded almost 20 years ago, "...research focusing on emotionally and politically charged issues relating to the supposed effects of television on social attitudes and human behavior should best be left to independent organizations which are expert in such matters and which have no direct responsibility for the regulation of the broadcast industry." Drug Advertising, supra, at n. 11.

manner designed to impose on all the value choices of some." Smolla Statement at 4. In other words, CSC's private programming preferences cannot and do not afford a constitutionally-permissible basis for regulatory discrimination against the home shopping entertainment format.

Further Studies. Apparently recognizing the flimsy nature of its showing, CSC urges the Commission to conduct further studies to demonstrate the harms associated with commercial programming.[25/] That, however, is the purpose of this inquiry. The Commission has asked interested persons, including CSC, to submit information which might support reregulation. This is the inquiry that CSC is asking for and, as is now apparent, evidence of such harms does not exist.

Conclusion

The comments herein overwhelmingly confirm SKC's claims that Commission action limiting television stations' broadcast of commercial matter in general or adoption of a home shopping format in particular would be content-based regulation clearly prohibited by the First Amendment. The two comments filed in opposition do not even address

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25/ CSC Comments at 24 et seq. CSC's bias is evident in the fact that it has apparently determined what the results of these studies will be, as it suggests that it will enable the Commission to "establish appropriate commercial limits for broadcasters."

constitutional considerations, much less demonstrate a governmental interest sufficient to warrant content-based regulation of speech. The "harms" they cite are nothing more than particularized expressions of aversion to commercial programming and private preferences for "more beneficial" types of programming. Such subjective program preferences are not constitutional bases for Commission regulation.

The Commission must reject the call to engage in widespread social engineering by dictating the types of programs which the American public can watch. Rather, it should stay on the course which began with Television Deregulation, facilitating broadcast stations' continued innovation and experimentation, and with it, their continued ability to be vigorous competitors on tomorrow's information superhighway.

Silver King Communications, Inc. therefore respectfully requests that the Commission terminate this inquiry.

Respectfully submitted,

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February 4, 1994

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In the Matter of

Limitations on Commercial Time on Television Broadcast Stations	) MM Docket No. 93-254)

REPLY STATEMENT OF RODNEY A. SMOLLA IN SUPPORT OF THE COMMENTS OF SILVER KING COMMUNICATIONS, INC.

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SUMMARY

The extraordinary claim that the reimposition of regulatory burdens on commercial programming is justified because advertising encourages "viewers to be especially interested in acquiring material goods for themselves, to the detriment of other aspects of life and the general society" is flatly inconsistent with First Amendment doctrines and policies, and should be rejected by the Commission.

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REPLY STATEMENT OF ROBERT A. SMOLLA
IN SUPPORT OF SILVER KING COMMUNICATIONS, INC.

On behalf of Silver King Communications, Inc. ("SKC"), I respectfully submit this Reply Statement in response to other comments received by the Commission in this proceeding.[1]

I. Introduction: Responding to the Claim That the Commission May Regulate Commercial Programming To Reduce the Materialism of American Culture.

This brief Reply Statement is submitted to respond to only one issue, raised by the comments of the Center for the Study of Commercialism, Center for Media Education, Consumer Federation of America, and Office of Communication of the United Church of Christ ("CSC Comments"): the quite extraordinary claim that the reimposition of regulatory burdens on commercial programming is justified because advertising encourages "viewers to be especially interested in acquiring material goods for themselves, to the detriment of other aspects of life and the general society. . . ."[2] That this assertion would be so openly and

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[1] Notice of Inquiry, MM Docket No. 93-254, 7 FCC Rcd 7277 (1993).

[2] CSC Comments at 4. The CSC Comments cite other rationales for returning to a regime of greater regulation of commercial programming. Those rationales, to the extent that they relate to the home shopping entertainment format of SKC stations, are dealt

forcefully advanced by the CSC Comments is admirable in one respect--it candidly lays on the table what is clearly the driving ideological conviction animating the CSC Comments' opposition to commercial programming.

II. The CSC Comments Do Not Attempt To Justify Their Claim Under Modern Commercial Speech Doctrines.

The CSC Comments do not argue that the First Amendment would permit the Commission to disfavor commercial programming because of the impact of the "commercial speech doctrine," the four-part test that currently governs judicial review of commercial speech regulation.[3] This attempt is not made, clearly, because it would

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with in the Reply Comments filed by SKC, and that discussion will not be duplicated here. Suffice it to note that the harms allegedly caused by commercial programming are largely inapplicable to the SKC format. As pointed out by SKC in its Comments, no claim is made that this format is deceptive, the format precludes advertiser involvement in programming, and the only children's programming broadcast by SKC stations is educational and commercial-free. See SKC Reply Comments at n.11. In the interest of brevity, this Statement is limited to joining issue on the broad philosophical argument that permeates the CSC Comments.

[3] The current standard governing regulation of commercial speech was set forth in Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The Central Hudson standard, as clarified in Board of Trustees v. Fox, 492 U.S. 469 (1989) (holding that the "not more extensive than